STATE OF MICHIGAN

COURT OF APPEALS

ELEANOR BRUNSELL,

Plaintiff-Appellant,

v

CITY OF ZEELAND,

Defendant-Appellee.

UNPUBLISHED
August 31, 2001

No. 224702
Ottawa Circuit Court
LC No. 98-030185-NO

Before: Holbrook, Jr., P.J., and Cavanagh and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right from the trial court's grant of summary disposition in favor of defendant. We affirm.

This action arises as a consequence of plaintiff allegedly sustaining injuries when she fell on a sidewalk located at the rear of several businesses. The sidewalk is adjacent to a travel lane that is separated from a public parking lot by a series of grassy medians. The sidewalk is owned by a bank that leased the premises to defendant. Pursuant to the lease, defendant was responsible for repairing the improvements it constructed, including the sidewalk, "as may be necessary for the public safety."

Defendant first moved for summary disposition, pursuant to MCR 2.116(C)(7), arguing that the negligence action was barred by governmental immunity, MCL 691.1401 *et seq*. Defendant argued that the sidewalk on which plaintiff fell was adjacent to a parking lot, not a highway and, thus, was not within the highway exception, MCL 691.1402(1). The trial court agreed and granted summary disposition, but allowed plaintiff to amend her complaint to allege a third-party beneficiary claim. Defendant then moved for summary disposition pursuant to MCR 2.116(C)(8) and (10), arguing that plaintiff, a member of the general public, was not an intended beneficiary of the contract. Relying on *Koenig v South Haven*, 460 Mich 667; 597 NW2d 99 (1999), the trial court agreed and granted summary disposition.

On appeal, plaintiff first argues that the sidewalk on which she fell was adjacent to a highway; therefore, the highway exception to governmental immunity is applicable. We disagree. This Court reviews a trial court's decision regarding a motion for summary disposition pursuant to MCR 2.116(C)(7) de novo. *Stanton v Battle Creek*, 237 Mich App 366, 374; 603 NW2d 285 (1999). We consider the affidavits, pleadings, and other documentary evidence filed in the action and construe the pleadings in favor of plaintiff where appropriate. *Id*.

Governmental agencies engaged in the exercise of a governmental function are immune from tort liability with five exceptions, including the highway exception. See MCL 691.1401 *et seq*.; *Nawrocki v Macomb Co Rd Comm*, 463 Mich 143, 156, 158; 615 NW2d 702 (2000). The highway exception requires that governmental agencies with jurisdiction over a highway "maintain the highway in reasonable repair so that it is reasonably safe and convenient for public travel." MCL 691.1402(1). Persons sustaining bodily injury or property damage because of the failure to meet this requirement may recover for the damages suffered. *Id.*

Under MCL 691.1401(e), the definition of "highway" includes sidewalks "on any highway." However, the highway exception to governmental immunity is narrowly drawn and an action may not be maintained unless it is clearly within the scope and meaning of the statute. See *Hatch v Grand Haven Charter Twp*, 461 Mich 457, 464; 606 NW2d 633 (2000); *Collins v Ferndale*, 234 Mich App 625, 628; 599 NW2d 757 (1999).

In this case, the issue is whether the travel lane adjacent to the sidewalk on which plaintiff fell was a highway or part of a public parking lot. Upon review of the record evidence, we conclude that the travel lane at issue is a means by which vehicles go into, out of, and through the parking area. Although the travel lane is separated from the parking spaces by medians with grass and trees, a parking lot consists of more than merely the spaces where the vehicles are actually parked. It is axiomatic that a parking lot must also consist of travel lanes for moving into, out of, and around the lot. In this case, the travel lane is part of the public parking lot and is not a highway. The highway exception does not extend to public parking lots. *Bunch v Monroe*, 186 Mich App 347, 349; 463 NW2d 275 (1990). Accordingly, the sidewalk adjacent to the public parking lot is not "on any highway" for purposes of the highway exception; therefore, defendant was immune from tort liability and the trial court properly granted summary disposition in defendant's favor on that basis. See *Stabley v Huron-Clinton Metropolitan Park Authority*, 228 Mich App 363, 369; 579 NW2d 374 (1998).

Next, plaintiff argues that the trial court erred in concluding that she was not an intended third-party beneficiary of the lease between the bank and defendant. We disagree. The trial court did not specify whether it granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(8) or (C)(10). However, because the trial court and the parties relied on facts outside the pleadings, this Court will consider the motion as being granted pursuant to MCR 2.116(C)(10). See *Driver v Hanley (After Remand)*, 226 Mich App 558, 562; 575 NW2d 31 (1997). When reviewing a motion granted under MCR 2.116(C)(10), this Court reviews the documentary evidence to determine whether a party is entitled to judgment as a matter of law or whether a genuine issue of material fact exists. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998).

Generally, a person not a party to an agreement cannot pursue a claim for breach of that agreement unless he proves to be an intended third-party beneficiary. See *Oja v Kin*, 229 Mich App 184, 192-193; 581 NW2d 739 (1998); *Alcona Community Schools v Michigan*, 216 Mich App 202, 204; 549 NW2d 356 (1996). Third-party beneficiary law in Michigan is codified at MCL 600.1405 and provides, generally, that a contractual promise will be construed as having been made for the benefit of a person or designated class of persons when the promisor undertook to give, do, or refrain from doing something directly to or for the person or class of persons. See MCL 600.1405(2)(b); *Koenig, supra* at 676; *Krass v Tri-County Sec, Inc*, 233 Mich App 661, 665-666; 593 NW2d 578 (1999). Whether the parties expressly intended to confer a

benefit on another is determined by examining the contract using an objective standard. *Id*. However, where the agreement is primarily to benefit the parties to the contract, a third person who incidentally benefits from the performance of the contact is not entitled to enforce it. See *Oja*, *supra* at 193; *Dynamic Const Co v Barton Malow Co*, 214 Mich App 425, 428; 543 NW2d 31 (1995).

In this case, plaintiff's claim that she is an intended third-party beneficiary of the lease between defendant and the bank is premised on the following maintenance provision:

> 5. Maintenance. The Lessee shall repair the improvements which it constructs on the premises as may be necessary for the public safety. The Lessor shall remove snow, pick-up litter, and perform such other sanitary maintenance as may be required.

Plaintiff argues that the "repair clause" and, in particular, the phrase "as may be necessary for the public safety" denotes a promise made for a designated class of persons, i.e., the public, to whom defendant directly intended to benefit by its undertaking of such repairs. Therefore, plaintiff contends, she is an intended third-party beneficiary of the lease as required to maintain her breach of contract action premised on defendant's failure to repair the sidewalk.

The trial court disagreed with plaintiff, holding that the public at large as the allegedly intended beneficiary of the agreement "was not a sufficiently defined class to allow the filing of a third-party beneficiary claim." We agree with the trial court that plaintiff failed to sustain her burden of proving that she was an intended third-party beneficiary of the lease for two reasons.

First, the maintenance provision of the lease, when objectively examined, was designed to primarily benefit the parties to the contract by allocating between the lessor and lessee the respective responsibilities regarding the maintenance of the premises. Defendant, which constructed the sidewalk, was implicitly delegated the responsibility of repairing structural deficits while the lessor was delegated the responsibility of routine, day-to-day maintenance regarding the sidewalk. Defendant did not, by inclusion of the phrase "as may be necessary for the public safety," undertake to repair the sidewalk directly for any non-party. The phrase merely indicates *when* the parties are to perform their maintenance tasks. Defendant is to repair conditions implicating safety, while the lessor is to perform routine maintenance "as may be required." Consequently, the language in the lease cannot reasonably be construed as a promise made directly for the benefit of any non-party to the contract within the contemplation of MCL 600.1405(1). See *Koenig*, *supra* at 676-677, 680.

Further, even if this Court construed the maintenance provision as a promise made for the benefit of a non-party, plaintiff's claim fails because she was not specifically named in the contract nor was she a member of a designated class of persons to whom the parties intended to directly benefit. In *Koenig*, *supra*, our Supreme Court recently held, in its lead opinion, that although a contract may create a class of third-party beneficiaries not yet in being or ascertainable, such class must be sufficiently described or designated. *Id*. at 680, quoting *Guardian Depositors Corp v Brown*, 290 Mich 433, 438; 287 NW 798 (1939). Consequently, the lead opinion concluded that "the class must be something less than the entire universe, e.g., 'the public'." *Id*. at 680. The dissenting justices did not disagree with this basic rule – that the protected class must be sufficiently described or designated. Rather, the dissenting justices

disagreed with the application of the rule to the particular memorandum at issue and would have held that the memorandum sufficiently described the intended class of beneficiaries. *Id*. at 691-692.

In this case, similar to *Koenig*, the only language in the lease that could possibly be construed as referring to a non-party was contained within the phrase "as may be necessary for the public safety," a reference to the public generally. In light of the rule of *Koenig*, that "the public" is too broad a term to constitute a class of intended third-party beneficiaries, plaintiff cannot be considered an intended third-party beneficiary of the lease and summary disposition in defendant's favor was properly granted.

Affirmed.

/s/ Donald E. Holbrook, Jr.
/s/ Mark J. Cavanagh
/s/ Patrick M. Meter